

isolating the license from operational liabilities and the claims of other creditors. However, there seems to be no justification for permitting conventional stock pledges, or more exotic arrangements along the lines described above, while at the same time prohibiting a limited security interest directly in certain of the rights granted under the broadcast license.

III. A LIMITED SECURITY INTEREST IN STATION LICENSES WILL BE SUBJECT TO SAFEGUARDS PURSUANT TO THE COMMISSION'S RULES AND POLICIES

As the Petition points out, Article 9 of the Uniform Commercial Code ("UCC") expressly recognizes that UCC provisions applicable to security interests can be preempted by applicable provisions of federal statutes or regulations. UCC § 9-104(a). See Aircraft Trading and Services v. Braniff, Inc., 819 F.2d 1227, 1230-31 (2d Cir.), cert. denied, 484 U.S. 586 (1987). Thus, a security interest in rights under a broadcast license would be subject to all of the provisions of the Communications Act and the FCC rules thereunder.

Commenters believe that the following restrictions would apply to a security interest in rights under a broadcast license, pursuant to the existing provisions of the Communications Act and FCC rules:

(i) A secured party could not "foreclose" on its security interest in a license (i.e., it could not obtain operational authority under such license or assign such license to a third party) without the prior approval of the FCC. Thus, the FCC would at all times retain its authority to approve broadcast licensees.

(ii) The rights of a secured party pursuant to its security interest would not exceed the scope of rights granted to a licensee under its license. Thus, for example, a secured creditor could not assert a right to compel renewal of the license.

(iii) The recognition of the limited security interest need not affect the independent proscription against the retention by sellers of a "reversionary interest" in station licenses.^{8/}

Commenters submit that these existing limitations on the scope of the rights of a secured party in a broadcast license are sufficient to guard against abuses.^{9/}

IV. RECOGNITION OF A LIMITED SECURITY INTEREST IN BROADCAST LICENSES WOULD PROMOTE COMMISSION POLICIES

Recognition by the Commission of a limited security interest in broadcast licenses will help further the Commission's

^{8/} Commenters acknowledge that the Motion for Declaratory Ruling filed by Crowell & Moring, also being considered in this proceeding, seeks to modify or clarify the prohibition on reversionary interests. Liberalization of these rules sufficient to permit secured seller financing would, in the view of Commenters, be appropriate and useful in encouraging yet another important source of broadcast financing. However, such liberalization is not essential to the relief sought by Commenters.

^{9/} The Commission may nevertheless wish to clarify certain procedural issues relating to security interests in station licenses. For example, it might be constructive for the Commission to specify a "foreclosure" procedure that would clearly identify the circumstances under which a secured lender holding a limited security interest in station licenses could apply to the Commission for approval of an involuntary assignment of the station licenses. However, in the view of Commenters, adoption of such specific foreclosure procedures is not essential in this proceeding. See Footnote 1, *supra*, for a discussion of certain existing foreclosure procedures utilized by lenders.

policies of diversity in broadcasting and improvement of broadcast services, by removing what is today a substantial obstacle to broadcast industry lending. Conversely, the absence of Commission action on this issue will cause a significant setback for these policies in both the short and long terms.

The Commission has long promoted diversity of ownership in broadcasting as a means of increasing "diversity in the selection of available programming, benefitting the public and serving the principle of the First Amendment." Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 52 R.R.2d 1301, 1302 (1982) (hereafter "Minority Ownership"). See also Multiple Ownership of Standard FM & TV Broadcast Stations, 22 F.C.C.2d 306, 310 (1970) ("in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than a few hands, the control of this powerful medium of public communication"); Amendment of Section 73.3555, 4 F.C.C. Rcd. 1741, 1742 (1988) ("the ultimate objective of the radio-television cross ownership rule is to enhance consumer welfare through the promotion of economic competition and diversity of programming and viewpoints"). Diversity is served when new voices, often without sufficient capital of their own, enter the broadcast market.

The Commission has also recognized that the availability of capital, and the regulatory flexibility necessary to encourage vehicles for financing of broadcasters, are essential to promoting its diversity goals. For example, in

developing its policies regarding minority ownership in broadcasting, the Commission has been "acutely aware of the lack of financing available to capitalize minority broadcast ventures." Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 F.C.C.2d 1249, 1254 (1984). Indeed, the Commission observed that the obstacles facing minorities included lack of access to fixed rate long-term funds of the sort provided by senior secured lenders. Id. at 1250.

Moreover, the Commission has fashioned regulatory structures designed to integrate its restrictions on licensee ownership and control with the reasonable expectations of the financial marketplace. Thus, for example, in determining that nonvoting stock, warrants and convertible debentures should not be considered "attributable interests" in a licensee for purposes of the multiple ownership rules, the Commission stressed that these devices represented "invaluable means by which existing and prospective licensees raise new capital," which might be discouraged if brought within the "concerns and constraints of the multiple ownership rules." In re Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 97 F.C.C.2d 997, 1020-1022 (1984). The Commission specifically noted that "[s]uch vehicles are . . . particularly significant in promoting the diversity of ownership at which the multiple ownership rules are directed." Id. at 1021.

Likewise, recognition of a limited security interest in broadcast licenses can help preserve a source of capital for

broadcasters--senior secured loans--without harm to any of the Commission's policies. As discussed above, such capital is needed, not only to promote the goal of diversity in broadcasting, but also to enable existing broadcasters to maintain and improve their services.

Conversely, failure to recognize at least a limited security interest in rights attendant to a broadcast license could doom to extinction senior secured lending to broadcasters. Already, the dicta that a security interest cannot be granted in a broadcast license is being repeated in a number of bankruptcy cases. E.g., Continental Bank, N.A. v. Everett, No. 90-C-1476 (N.D.Ill. March 28, 1991) (Westlaw, 1991 WL 42690). Whatever the validity of the reasoning in such cases--and, as noted above, Commenters believe such reasoning is questionable--there is no doubt that such cases have contributed to the capital drought currently facing broadcasters. If commercial banks and other senior lenders come to believe that they cannot obtain a priority interest in the full value of a station's assets and operations, that drought may be extended indefinitely. Even if lenders continue to participate in the broadcasting industry, their efforts may increasingly be directed towards "deep-pocket" broadcasters with balance sheets strong enough to compensate for the lack of security inherent in their collateral. Higher-risk entrepreneurs and minority purchasers undoubtedly will suffer the most from increased retrenchment on the part of lenders to the broadcasting markets.

V. CONCLUSION

For reasons stated above, Commenters respectfully request that the Commission grant the Petitioner's request for a declaratory ruling that creditors may take a limited security interest in a broadcast license or in rights attendant thereto.

Respectfully submitted,

AMERITRUST COMPANY NATIONAL
ASSOCIATION
CHEMICAL BANK
NEW BANK OF NEW ENGLAND, N.A.

By:



Eric L. Bernthal
Gary M. Epstein
Bruce E. Rosenblum
Martin F. Petraitis
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, DC 20004-2505
(202) 637-2200

Their Attorneys

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CERTIFICATE OF SERVICE

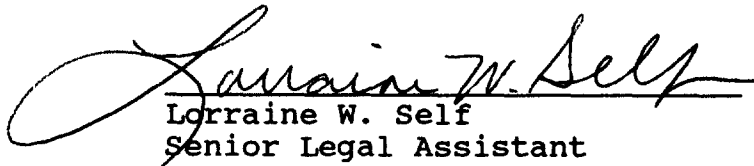
I, Lorraine W. Self, Senior Legal Assistant with the law firm of Latham & Watkins, do hereby certify that I have on this 22nd day of April, 1991, caused copies of the foregoing Comments of Ameritrust Company National Association, Chemical Bank and New Bank of New England, N.A. to be served by first class U.S. mail, postage prepaid, upon the following:

Roy J. Stewart*
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

Kathleen Ham, Esq.*
Policy & Rules, Legal Branch
Federal Communications Commission
2025 M Street, N.W.
Room 8002
Washington, D.C. 20554

Victor E. Ferrall, Jr., Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Marvin J. Diamond, Esq.
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004


Lorraine W. Self
Senior Legal Assistant

* By Hand Delivery